LIM KEAN HONG

v.

TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ANOR. & ANOTHER CASE

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL APPLICATION NOS. 54-3-89, 54-15-89]
28 NOVEMBER 1989

ADMINISTRATIVE LAW: *Habeas Corpus - Section 365 of the Criminal Procedure Code - Application for directions - Detention under s. 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 - Article 43A(2) of the Federal Constitution - Detention for a period of 2 years - Section 6(1) of Act - Duty of Advisory Board - Section 11(1) report of board 'recommending' extension of detention - Whether proper - Whether therefore decision of board null and void - Effect of - Section 3(2) proviso (a), (b) and (c) of the Act - Condition precedent for detention beyond 14 days - Whether fulfilled - Obligation of Minister on receiving report from board - Section 11(3), (4).*

STATUTORY INTERPRETATION: *Interpretation Act 1976 - 'Day' - Section 54(1)(a) - Section 3(2), proviso (a), (b), (c) - 'Shall forthwith report'.*

These were two applications for directions of the nature of a *habeas corpus* under s. 365 of the Criminal Procedure Code. The applicants were detained under s. 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985, (the Act).

There was a review of the detention orders by the Advisory Board under s. 11(1) of the Act. In both reports the board 'recommended' that the detentions should be extended. In their *habeas corpus* applications both applicants raised 3 common issues of law.

The first was that the recommendations of the board, that the detentions be further extended beyond the detention period ordered under s. 6(1) of the Act, were null and void. The second issue was as to the legality of the third phase of both detentions after their arrest for the purpose of investigation. The third issue was that both applicants were detained one day later after the date of their respective detention orders, this being in contravention of s. 6(1) of the Act.

Held:

[1] Under s. 11(2) of the Dangerous Drugs (Special Preventive Measures) Act 1985 the Advisory Board must submit a report to the Minister but it has no power to give an opinion that the detention be extended beyond the period ordered under s. 6(1) of the Act.

[2] The Advisory Board has to give an opinion either that the detention should cease or under s. 11(4) of the Act that the detention should continue for the balance of the original period of detention ordered under s. 6(1).

[3] If the Advisory Board gives the opinion that the detention should cease, the Minister is obliged to revoke the order under s. 11(3). However, if the board gives the opinion that the detention should continue then the Minister has a choice either to continue detention or by implication to revoke the detention order under s. 11(4) of the Act.

[4] The applicants have succeeded in showing that their continued detention under s. 6(1) after the Advisory Board had given null and void opinions in their respective cases was not valid and consequently the Deputy Minister could not have made orders of further detentions for them under s. 11A.

[5] The detention of the applicants was invalid as their detention did not commence from the date of their respective detention orders.

[Application allowed.]

Cases referred to:
Setali Development Sdn. Bhd. & Anor. v. Lim You Keng [1983] CLJ (Rep) 359
Anisminic Ltd. v. Foreign Compensation Commission & Anor. [1969] 1 All ER 208

Legislation referred to:
Criminal Procedure Code, s. 365
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 3(2), 3(2)(c), 6(1), 11(1), 11(2), 11(3), 11(4)
Federal Constitution, art. 43A(2)
Interpretation Act 1967, s. 54(1)(a)

For the applicants - Gooi Hock Seng; M/s. Shan & Gooi
For the respondents - Balia Yusof, Deputy Public Prosecutor

JUDGMENT

KC Vohrah J:

In this judgment I shall deal with two applications for directions of the nature of a *habeas corpus* under s. 365 of the Criminal Procedure Code filed by the same solicitors and which by consent of the parties were taken together for argument before the Court. Both raise the same issues of law.

Lim Kean Hong in criminal application 54-3-1989 and Ong Guan Huat in criminal application 54-15-89 were separately arrested and detained for the purpose of investigation by the police under s. 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). And pursuant to separate detention orders made by the Deputy Minister of Home Affairs acting under Article 43A(2) of the Federal Constitution, they were sent for detention for a period of two years, under s. 6(1) of the Act, at a detention centre, the Pusat Pemulihan Akhlak, Muar, Johore.

The Advisory Board reviewed these two detention orders under s. 11(1) of the Act within the time frame specified therein and submitted a report on Lim and a report on Ong to the Minister of Home Affairs. In both reports the board "recommended" that the detention of both Lim and Ong should be extended (beyond their original two year period of detention). It is clear, and the Deputy Public Prosecutor so concedes, that the Advisory Board has no power vested in it so to give such a recommendation in either case.

Now for the issues. In their *habeas corpus* applications Lim and Ong raised, three common issues of law.

The most obvious issue is in regard to the effect of the Advisory Board's null and void recommendation. It is argued that its recommendation that the detention of the two applicants be further extended beyond the detention period ordered under s. 6(1), being null and void, meant that the detainees could not be detained for the balance of the detention period originally ordered for both detainees as from the respective dates the board submitted its report on Lim and Ong.

The other issue arises in regard to the legality of the third phase of the detention of both of them, soon after their arrest for the purpose of investigation. The issue is whether after they had been arrested and validly detained under two succeeding phases, i.e., under proviso (a) and under proviso (b) to s. 3(2) of the Act, their continued detention, purportedly under proviso (c) to s. 3(2), was valid.

Yet another issue relates to the fact that both Lim and Ong were detained one day later after the date of their respective detention orders. Counsel says this is in contravention of s. 6(1).

Proviso (c) to s. 3(2)

I shall deal with the issue relating to s. 3(2) first and since the arguments relate to the said provision wherein there are references to specific periods of time I would have to deal concrentely with specific dates. And I would take Lim's case first to illustrate the issue. But before that let me set out what is stated in s. 3(2):

> 3.(1) ...
>
> (2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection (1) of s. 6:
>
> Provided that:
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> (a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;
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> (b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;
>
> (c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

In regard to proviso (a) to s. 3(2), Counsel for Lim concedes there was due compliance. Lim was arrested by Chief Inspector Sulaiman on 26 March 1987 at 1.30p.m. Lim's detention beyond 24 hours from 1.30p.m. on 27 March 1987 was authorised in writing by Inspector Lawai on 27 March 1987 at 12.30p.m. (see document of authorisation "CLL1" exhibited in the affidavit of Inspector Lawai).

In regard to proviso (b) to s. 3(2), Counsel also concedes that there was due compliance. ASP Fariduddin on 28 March 1987 at 11.50a.m. authorised in writing the further detention of Lim for an additional period beyond 48 hours (see document of authorisation "EA1" exhibited in the affidavit of ASP Fariduddin). It is in regard to proviso (c) to s. 3(2) that Counsel for Lim says there has been no compliance. DSP Cheok in his affidavit says that on 9 April 1987 at about 11.35a.m. he authorised in writing the detention of Lim beyond 14 days. The document of authorisation exhibited in his affidavit shows that the detention was for an additional period of 46 days commencing from 9 April 1987. Counsel for Lim argues that the DSP, when he authorised the detention under proviso (c), authorised it after the 14 day period specified under proviso (c) had expired; that DSP Cheok ordered the further detention on the 15th day and therefore the continued detention of Lim purportedly under proviso (c) was not valid.

He argues that a "day" in the word "days" in proviso (c) cannot be a 24hour day calculated on the basis of elapsed hours from the time and date of the arrest i.e., 1.30p.m. on 26 March 1987. He says it should be calculated from a midnight to midnight basis. I agree with his view as proviso (a) and proviso (b) specifically mention the "hours" rather than the "days" that a person arrested under s. 3(2) can be detained for investigation ("not exceeding sixty days under s. 3(2)") and the language of proviso (c) refers to "days", not hours, for further detention under that proviso and I can see no ambiguity at all that the day to be taken into account in proviso (c) is a day computed on the basis of midnight to midnight. But the period of 14 days from the date of arrest is not inclusive of the day of arrest; this is so because s. 54(1)(a) of the Interpretation Act 1967 provides that in computing time for the purpose of any written law "a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event or the act or thing is done." (See also the Federal Court case of *Setali Development Sdn. Bhd. & Anor. v. Lim You Keng* [1983] CLJ (Rep) 359 at p. 362.) Thus, in Lim's case the day of arrest, i.e., 26 March 1987, must be excluded when computing the period of 14 days specified in proviso (c) to s. 3(2); the day that DSP Cheok issued the document of authorisation, i.e., 9 April 1987, was the fourteenth day from the day Lim was arrested and the authorisation, if at all it was necessary, was within the fourteen day period.

The question, however, may be asked whether there was any necessity for DSP Cheok to have issued the document of authorisation? My view is that there was no necessity for him to do so.

Unlike the two earlier provisos (a) and (b) which specifically do not permit detention exceeding specified hours "except with the authority of a police officer" of a certain rank or above there is no such specificity in proviso (c) relating to the need for authorisation by any police officer. And I do not see any ambiguity in the language used in proviso (c). What is required as a condition precedent for detention beyond fourteen days is that before the expiry of the fourteenth day from the date of the arrest of the detainee, a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by him in that behalf. And additionally the Inspector-General or the designated officer has forthwith reported the same to the Minister.

Incidentally, I believe the words "shall forthwith report" in the proviso should read as "has forthwith reported" otherwise grammatically there appears to be an error in the sentence.

It seems to me that as soon as the Inspector General of Police or the designated officer or the Minister receives the report of the circumstances relating to the arrest and detention of a person and the Inspector General, the designated officer or the Minister is of the view that the detention should cease such person may order the detention under s. 3(2) to cease; otherwise the detention may continue beyond the 14 days but not more than the 60 days which is specified in s. 3(2).

As far as the applicant Lim is concerned, the affidavit of DSP Cheok shows that DSP Cheok reported the circumstances of the arrest and detention of Lim to Senior Assistant Commissioner I (SAC I), Sulaiman bin Mohd. Hassan, who was the officer designated by the Inspector-General of Police under s. 3(2)(c) of the Act, on 8 April 1987. SAC I Sulaiman confirmed what DSP Cheok stated in his affidavit. He also stated that on the same day (i.e., 8 April 1987) he reported these circumstances to the Minister. All these were done on the thirteenth day computed from the date of arrest of Lim. There is therefore fulfilment of the condition precedent mentioned in proviso (c) so far as Lim is concerned.

As far as the applicant Ong is concerned, in regard to his detention under proviso (c) to s. 3(2), the affidavit of Acting Superintendent of Police Mustapha Kamil bin Yaakob shows that on 22 May 1987 he reported the circumstances of the Lim's arrest and detention to SAC I Sulaiman bin Mohd. Hassan, the designated officer under s. 3(2)(c) of the Act. This was done well within fourteen days from the date of the arrest of Ong which was on 16 May 1987. SAC I Sulaiman bin Mohd. Hassan in his affidavit confirmed that he received a report of the circumstances mentioned by Acting Superintendent Mustapha. SAC I Sulaiman stated that on the same day he reported the said circumstances to the Minister. As for Ong, too, there is fulfilment of the condition precedent mentioned in proviso (c) and his further detention beyond 14 days is valid.

Section 11.

I now come to the issue under s. 11 as regards the effect of the null and void opinion of the Advisory Board that the two applicants be detained beyond the original period of detention. If one develops the argument advanced by Counsel for the applicants on s. 11 to its logical conclusion, bearing in mind that the Minister appears to be obliged to make a decision either under s. 11(3) or under s. 11(4), then the extended detention of both Lim and Ong appears to be invalid.

Section 11, in so far as it relates to a detention order, reads:

> 11. (1) Every order made or given by the Minister under subsection (1) ... of s. 6, ... shall, so long as it remains in force and whether or not representation under s. 9 have been made, be reviewed by an Advisory Board not earlier than twelve months from the date of such order and in any case not later than three months before the expiration of the period mentioned in such order or direction:
>
> Provided that the Minister may, at any item during the period of detention ... imposed by such order ..., direct the Advisory Board to review the case.
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> (2) The Advisory Board shall, in completing every review under this section, submit to the Minister, before the expiration of the period of detention ..., a written report or every such review.
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> (3) Where the Advisory Board has reported that in its opinion the detention should cease, the Minister shall revoke the detention order ...
>
> (4) Where the Advisory Board has reported that in its opinion the detention ... should continue the Minister may continue the detention ... of the person concerned.

So far as a detention order is concerned, the Advisory Board, after its review of the detention order within the time frame specified in s. 11(1), must submit a report to the Minister under s. 11(2). Before the amendment of s. 11 by Act A629 in December 1985 the Advisory Board in its report could give one of three opinions, one of which was that the detention should be extended (beyond the original detention period ordered under s. 6(1)). After the amendment the Advisory Board in its report must give one of the remaining two opinions:

(1) that the detention should cease, or

(2) that the detention should continue (for the balance of the detention period made under s. 6(1) of the Act.)

The Advisory Board in the instant two cases "did recommend", according to the affidavits of the Deputy Minister (see Encl. 7 in Lim's application and Encl. 3 in Ong's application) that the detention orders of both the applicants be extended (beyond the original detention period ordered therein by the Minister under s. 6(1) of the Act). But the Advisory Board

had no power to give such a decision or, rather, such an "opinion" (in the language of s. 11) in either case and its opinion is therefore a nullity in either case. The DPP concedes that and I do not think that can be gainsaid bearing in mind *Anisminic Ltd. v. Foreign Compensation Commission & Anor*. [1969] 1 All ER 208. It seems to me that the law is clear under s. 11(2) that the Advisory Board must submit a report to the Minister. But in the report, as the law stands after the 1985 amendment, it has no power to give an opinion that the detention be extended (beyond the period ordered under s. 6(1)). The Advisory Board, in my view, is obliged to give one of two opinions and no other. Nor can it remain silent in its opinion. It has to give an opinion, either under s. 11(3), that the detention should cease or, under s. 11(4), that the detention should continue (for the balance of the original period of the detention ordered under s. 6(1) of the Act). And legal consequences follow depending on which opinion is given. If the Advisory Board gives the opinion that the detention shall cease, the Minister is obliged to revoke the order under s. 11(3) and if the Advisory Board gives the opinion that the detention should continue then the Minister has to decide whether to continue the detention or, by implication, to revoke the detention order under s. 11(4).

Thus, it behoves the Advisory Board to report its opinion to the Minister either for the detention to cease or for the detention to continue and it behoves the Minister to consider the report containing what is required by law to be given by the board. When an opinion not sanctioned by the law, a null and void opinion, is given in the report the Minister is deprived of his legal duty to revoke the detention order under s. 11(3) or to make a decision under s. 11(4) to continue the detention period for its full period or to revoke the detention order. The point is that the Minister is obliged to make a decision, either under s. 11(3) or under s. 11(4) and the decision is dependent on the Advisory Board giving one of the two statutory opinions. It is clear there cannot have been decision made by the Minister if the Advisory Board had given a null and void opinion in its report to the Minister. There having been no decision made by the Minister to continue the detention under s. 11(4), the continuation of the detention of a detainee up to the end of the original period imposed under s. 6(1) cannot be valid. It would follow that an extended detention under s. 11A by the Minister beyond the detention period originally ordered under s. 6(1) may therefore be faulted because the extended detention would take effect after the invalid period of continued detention.

My attention has, however, be drawn to the Supreme Court decision in *Menteri Hal Ehwal Dalam Negeri and Ors. v. Chua Teck,* Supreme Court Criminal Appeal No. 05-29/1989, delivered on 26 September 1989. ([1990] 1 CLJ (Rep) 178) Counsel for the applicants in the instant cases appeared together with two other Counsels in the Supreme Court for the respondent in that case and he said that the issue under s. 11 raised in the present two applications was not raised in the High Court and because of that he was not allowed to raise the issue in the Supreme Court. I have spent some anxious moments going through the judgment of the Supreme Court. There is this passage in the judgment of the Supreme Court which appears to touch on the issue and which reads:

> It is open to the Minister to consider all informations or reports as are available to him. In this case he referred to the police case file and also the report of the Advisory Board. No doubt the report of the Advisory Board made a recommendation which it had no business to make but that should not impair the decision of the Minister. In any case the Minister is not bound by the recommendation of the Advisory Board when it comes to the question of continuing the detention of a detainee under the Act. According to s. 11(3) and (4) of the Act although the Minister shall revoke the detention order where the Advisory Board has reported

that in its opinion the detention should cease but where the Advisory Board has reported that in its opinion the detention should continue the Minister has the discretion whether or not to continue the detention.

The question is whether from this passage it can be said that the Supreme Court has determined the specific issue brought, not under s. 11A, but under s. 11(4). Is the continuation of a period of detention ordered under s. 6(1), after the Advisory Board has given a null and void opinion, valid? It is not so much a question about extended detention under s. 11A.

There is reference in the passage to s. 11(4) but the question of whether there is a duty on the Deputy Minister to make a decision either to continue the detention or to revoke the order of detention under s. 11(4) was not touched upon. Nor was the connected question touched upon - whether if there is such a duty, the Deputy Minister can lawfully make a decision under s. 11(4) when a null and void opinion is reported to him by the Advisory Board.

In the circumstances I would have to say, for the reasons I have given, that the applicants have succeeded in showing that their continued detention under s. 6(1) after the Advisory Board had given the null and void opinions in their respective cases was not valid and consequently the Deputy Minister could not have made orders of further detention for them under s. 11A.

Section 6(1)

In regard to the last issue I would have to advert to the decision of the Supreme Court in Supreme Court Criminal Appeals Nos. 05-51 of 1989 and 05-53 of 1989 given on 14 November 1989 where the Supreme Court held invalid the detention of two persons on the ground that their detention did not commence from the date of their respective detention orders. In the cases before me, Lim was detained from 24 May 1987 whereas the order of detention made in regard to him under s. 6(1) was dated 23 May 1987. As regards Ong he was detained as from 14 July 1987 whereas the order of detention in regard to him was dated 13 July 1987. Thus both respondents also succeed on this issue.

In the circumstances I order that Lim Kean Hong and Ong Guan Huat be set at liberty under s. 365 of the Criminal Procedure Code.

Also found at [1990] 1 CLJ 1161